

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

**KEVIN J. BATES,**

**Petitioner,**

**8:18CV322**

**vs.**

**SCOTT R. FRAKES,**

**ORDER**

**Respondent.**

This matter is before the Court on the Notice of Appeal, ECF No. 27, filed by Petitioner Kevin Bates, and the Memorandum, ECF No. 28, filed by the Clerk. The Clerk's Memorandum states the "clerk's office cannot process the appeal to the Eighth Circuit until one or more issues are resolved.<sup>[1]</sup>" ECF No. 28. The Memorandum then asks the Court to determine whether Bates is entitled to proceed on appeal in forma pauperis.

When the Court ruled on Bates's Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254, it also denied him a certificate of appealability. Mem. and Order, ECF No. 25, Page ID 1143; Rule 11 of the *Rules Governing Section 2254 Cases in the United States District Courts* ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). Rather than seeking a certificate of appealability from the Eighth Circuit Court of Appeals, Bates filed a Notice of Appeal with this Court. Rule 22(b)(2) of the Federal Rules of Appellate Procedure provides that "[i]f no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals." Bates "cannot take an appeal unless a circuit justice or a circuit . . . judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P. 22(b)(1). Accordingly,

IT IS ORDERED:

1. The Clerk is directed to forward the Petitioner's Notice of Appeal, construed as a request for a certificate of appealability, ECF No. 27, and the other materials required by Federal Rule of Appellate Procedure 22(b)(1) to the Eighth Circuit Court of Appeals;
2. If the Court of Appeals grants the Petitioner's request for a certificate of appealability, the Petitioner is permitted to proceed on appeal in forma pauperis under Federal Rule of Appellate Procedure 24(a)(3).

Dated this 30th day of July, 2019.

BY THE COURT:

s/Laurie Smith Camp  
Senior United States District Judge